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IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT

No. 22—May Term, 1953

SHIRKS MOTOR EXPRESS CORPORATION,
Appellant,

vs.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania

---

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AT No. 2015 EQUITY DOCKET, COMMONWELTH DOCKET No. 34, 1952

JURISDICTIONAL STATEMENT FILED PURSUANT TO RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

To the Honorable, the Chief Justice of the Supreme Court of Pennsylvania:

Shirks Motor Express Corporation, Appellant in the above entitled case and Petitioner for the Allowance of an Appeal to the Supreme Court of the United States from final judgment of the Supreme Court of Pennsylvania in

this cause, herewith respectfully presents a separate, typewritten statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Pennsylvania, said statement being filed pursuant to Rule 12 of the Supreme Court of the United States.

Statutory Provision Believed to Sustain Jurisdiction

1. Title 28, United States Code, Section 1257, Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. C. A. Section 1257, F. C. A. 28 Section 1257, provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Statute of the Commonwealth of Pennsylvania, the Validity of Which Is Involved

2. The statute of the Commonwealth of Pennsylvania, the validity of which is involved in this cause, is the Act of June 22, 1931, P. L. 694, as last amended by the Act of December 27, 1951, P. L. 1761. The said Act of 1931, as amended, prior to the said amendment of 1951, contained the following pertinent provisions:

> "*Section 1.* Be it enacted, &c., That the word 'company,' as used in this act, shall be construed to mean any individual who, or copartnership, corporation, joint-stock association, or association of individuals whatsoever which, shall engage in the business of carry-

ing passengers or property for hire over the highways of this Commonwealth in motor vehicles or trackless trolleys. For the purposes of this act, the term 'motor vehicle' shall be construed to mean every vehicle which is self-propelled, except such as move upon or are guided by a track erected upon the highways.

Section 2. Each company shall pay an excise tax for the use of the highways of this Commonwealth. For the purpose of ascertaining the amount to be paid, each such company shall, on or before the first day of February, of each year, file with the Department of Revenue, on forms prescribed and furnished by it, a report, under oath or affirmation, setting forth: (1) The name and address of the company owning or operating such motor vehicle or vehicles; (2) the location of the principal place of business of such company; (3) the name and address of the person in this Commonwealth upon whom service of process or other notice may be had against such company; (4) a schedule, if any, or, if not, a description of the routes over which such company shall have operated over highways in this Commonwealth during the period for which the report is filed; (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed; and (7) the amount of gross receipts of such company from all sources upon its operations during the period for which the report is filed, and such other relevant information as the Department of Revenue may require in connection with the settlement of the excise tax hereinafter provided, for the calendar year immediately preceding the first day of January of each year.

Section 3. The amount of excise tax annually to be paid by each company specified in section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon

the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of all routes operated by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles. In the event, however, that an excise tax shall be paid by any company to any city of this Commonwealth for the use of its highways, during the period for which the report is filed, the amount of such tax, so paid, may be deducted from the amount of tax payable to the Commonwealth, as above computed, upon satisfactory proof to the Department of Revenue of such payment; and, in addition thereto, where any such company shall have paid to the Department of Revenue a registration fee or fees, as provided for by the laws of this Commonwealth, upon any motor vehicle or motor vehicles used in the business of carrying passengers or property for hire over the highways of this Commonwealth, it shall receive a credit in each settlement for gross receipts tax made hereunder to the extent of the total amount of the registration fee or fees paid for the calendar year of which the period covered by the settlement was a part.

"*Section 9.* All taxes, penalties, interest, and bail forfeited which shall be received, recovered, paid, or collected under the provisions of section three, division (1) of this act, from companies operating routes which are entirely within the limits of this Commonwealth, shall be paid into the State Treasury, through the Department of Revenue, and credited to the General Fund; and all taxes, penalties, interest, and bail for-

feited which shall be received, recovered, paid, or collected under the provisions of section three, division (2) of this act, from companies operating over routes when only a part of such routes lies within the Commonwealth, shall be paid into the State Treasury, through the Department of Revenue, and credited to the Motor License Fund."

The said Act of 1951 amended, inter alia, Sections 3 and 9 so as to read as follows:

"*Section 3.* The amount of excise tax annually to be paid by each company specified in section one of this act shall be as follows: (1) In case of a company operating routes which are entirely within the limits of this Commonwealth, eight (8) mills upon the dollar upon the gross receipts of such company from all operations for the period covered by such report; and (2) in case of a company operating over routes when only a part of such routes lies within this Commonwealth, eight (8) mills upon the dollar upon such portion of the gross receipts of such company as is represented by the ratio that the number of miles of routes operated in this Commonwealth by such company, during the period for which the report is filed, bears to the total number of miles of all routes operated by such company during said period. The provisions hereof shall not be construed as exempting any company from complying with the laws relating to fees payable to the Department of Revenue for the registration of motor vehicles.

Section 9. All taxes, penalties, interest, and bail forfeited which shall be received, recovered, paid, or collected under the provisions of section three of this act, shall be paid into the State Treasury, through the Department of Revenue, and credited to the General Fund."

Section 3 of the said Act of 1951 provides:

"*Section 3.* The provisions of this act shall become effective immediately upon final enactment, and shall

apply to the excise tax imposed and payable hereunder for the calendar year one thousand nine hundred fifty-one and thereafter."

Date of Judgment Sought to Be Reviewed and of Application for Appeal

3. The judgment sought to be reviewed was entered by the Supreme Court of Pennsylvania on November 17, 1953 and a Petition for Reargument was refused by said Court on December 30, 1953. The application for appeal to the Supreme Court of the United States was presented on the twenty-second day of January, 1954.

Statement of the Nature of the Case

4. On February 27, 1952 Petitioner filed a Bill of Complaint for Injunction against the Defendant-Appellees in the above entitled case in the Court of Common Pleas of Dauphin County, praying that an injunction be issued enjoining and restraining said Defendant-Appellees from enforcing the provisions of the aforesaid Act, as amended, and that said Act be decreed to be unconstitutional and void. The Bill averred, inter alia, that the said Act is repugnant to the Constitution of the United States, as follows:

"22. Plaintiff is advised by counsel, believes, and therefore avers that the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, Act No. 469, is unconstitutional, illegal, and void, for the following reasons:

(a) The Act violates the Commerce Clause of Article I, Section 8, of the Constitution of the United States, in that the tax which it levies upon interstate commerce is not levied as compensation for the use of the highways and/or to defray the expense of regulating motor traffic, but is levied as a mere revenue measure, and even if said tax were imposed for such a proper purpose the tax thus exacted is

excessive, bears no reasonable relation to the privilege of using the highways of the State, is discriminatory, and is so large as to obstruct interstate commerce, and, as applied to the plaintiff, is oppressive, discriminatory, and unduly burdensome and does unduly interfere with and restrict the exercise of the privilege granted to the plaintiff by the Interstate Commerce Commission to operate over routes in interstate commerce.

(b) . . . .

(c) The Act violates Article XIV, Section 1, of the Constitution of the United States, and Article I, Section 1, and Article I, Section 9, of the Constitution of the Commonwealth of Pennsylvania, in that said Act No. 469 is discriminatory and effects a substantial and burdensome increase in the amount of tax payable by and, in effect, imposes a new tax upon the plaintiff, and, although such Act No. 469 was not enacted until December 27, 1951, it provides that the said tax imposed and payable thereunder shall be imposed retroactively upon the gross receipts for the entire calendar year of 1951." (12a-14a)

5. The Defendants filed Preliminary Objections in the nature of a demurrer to the said Bill of Complaint and the Court of Common Pleas sustained the demurrer and dismissed the Plaintiff's Bill of Complaint by its Order of August 25, 1952.

6. The Opinion of the Court of Common Pleas set forth each of the Plaintiff's above stated contentions with respect to the repugnancy of the said Act to the Constitution of the United States (33a-34a) and concluded that these contentions were without merit and that the said Act did not violate these provisions of the United States Constitution in any respect (the Opinion appeared in the Record at page 29a).

7. The Petitioner thereupon appealed to the Supreme Court of Pennsylvania, where this case was consolidated,

for the purpose of appeal, with *Interstate Motor Freight System, Inc.* v. *Otto F. Messner, et al.*, at No. 25 May Term 1953, one brief being filed for Appellants and Appellees, respectively. Pursuant to the rules of the Supreme Court of Pennsylvania requiring parties to state the questions involved, Petitioner, in its brief (page 1), stated the said Federal questions in the following words:

> "1. Does the Act of June 22, 1931, P. L. 694, as last amended by the Act of December 27, 1951, P. L. 1761, violate the Commerce Clause of Article I, Section 8, of the United States Constitution? Negatived.
>
> 2. . . . .
>
> 3. Does the aforesaid Act, as amended, violate the Commerce Clause of Article I, Section 8, and Article XIV, Section 1, of the United States Constitution and Article IX, Section 1, of the Pennsylvania Constitution? Negatived.
>
> 4. Does the Act of December 27, 1951, P. L. 1761, violate Article XIV, Section 1 of the United States Constitution and Article I, Sections 1 and 9, of the Pennsylvania Constitution? Negatived."

The above stated Federal questions were argued at length before the Supreme Court of Pennsylvania (Appellants' brief, pages 6-46, 68-74. Appellees' brief, pages 2-23, 34-48, 63-71).

8. The Supreme Court of Pennsylvania by its judgment entered on November 17, 1953 expressly decided the questions respecting the validity of said statute, held that it was not repugnant to the Constitution of the United States, and sustained its validity.

Authorities Believed to Sustain Jurisdiction

9. Petitoner cites *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, and *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, as sustaining the jurisdiction of

the Supreme Court of the United States of this cause upon appeal.

Authorities Showing Question Is Substantial

10. The constitutional questions involved are substantial and Petitioner submits the following grounds for this assertion: This case was argued before the Supreme Court of Pennsylvania on April 20, 1953 and the decision was not handed down until November 17, 1953. The dissenting opinion filed by Mr. Justice Bell holds that the said Act of 1931, as amended in 1951 violates the Commerce Clause of the United States Constitution and as to interstate carriers is unconstitutional and void. Said dissenting opinion concludes that the tax imposed by said Act upon interstate carriers is not imposed as compensation for the use of Pennsylvania highways, because not one cent of the tax receipts is used directly or indirectly for highway use and for other reasons. It also concludes that the decision of the Court is contrary to decisions of the United States Supreme Court, including *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, *Ingels* v. *Morf,* 300 U. S. 290, and *Spector Motor Service* v. *O'Connor,* 340 U. S. 602. It is contended by Petitioner that this conclusion of Mr. Justice Bell is in full accord with the controlling decisions of the Supreme Court of the United States, including those above cited, while the majority opinion departs from those precedents and, by upholding this Act, "makes meaningless the Commerce Clause . . . and the numerous decisions which maintain and support it" (Dissenting Opinion). Petitioner also contends that the holding by the Supreme Court of Pennsylvania that a tax imposed upon the gross receipts of carriers as a charge for the use of the state's highways may be made retroactive for a year prior to the date of its enactment disregards the principle that a tax cannot be made retroactive where such

tax could not reasonably have been anticipated by the taxpayer at the time of the voluntary Act which the statute later made the taxable event and overlooks the distinction between taxes in the category of income taxes and those in the category of gift taxes, contrary to decisions of the United States Supreme Court, including *Untermeyer* v. *Anderson*, 276 U. S. 440, *Nichols* v. *Coolidge*, 274 U. S. 531, and *Welch* v. *Henry*, 305 U. S. 134, 147.

11. A copy of every opinion filed in this cause is appended hereto.*

Respectfully submitted,

(S.) FRANK A. SINON,
(S.) JOHN R. NORRIS,
Counsel for Petitioner.

RHOADS, SINON AND READER,
BALDWIN, JARMAN AND NORRIS,
Of Counsel.

(3938)

(* Clerk's Note: These Opinions are being printed as Appendix to the Statement as to Jurisdiction in the case of *Interstate Motor Freight System, Incorporated v. Otto F. Messner, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, et al.*, 606, October Term, 1953, and are not reprinted here.)

19

MAR 3 1954
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 615

SHIRKS MOTOR EXPRESS CORPORATION,
Appellant,

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

H. F. STAMBAUGH,
Special Counsel,
FRANK F. TRUSCOTT,
Attorney General,
Counsel for Appellees.

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IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

No. 22, MAY TERM, 1953

SHIRKS MOTOR EXPRESS CORPORATION,
Appellant,

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellees

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AT No. 2015 EQUITY DOCKET, COMMONWEALTH DOCKET No. 34, 1952.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellees submit that the appellant's statement of jurisdiction presents no substantial federal question. The questions presented therein have been decided by this court in numerous decisions.

The tax is levied as compensation for use of the highways.

The title of the Act of June 22, 1931, P. L. 694, is as follows:

> "Imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or

operators of motor vehicles transporting passengers and property for hire."

Section 2 of the Act, 72 P. S. Section 2184, provides as follows:

> "Each company shall pay an excise tax for the use of the highways of this Commonwealth. For the purpose of ascertaining the amount to be paid, each such company shall, on or before the first day of February, of each year, file with the Department of Revenue, on forms prescribed and furnished by it, a report, under oath or affirmation, setting forth: * * * (4) a schedule, if any, or if not, a description of the routes over which such company shall have operated over highways in this Commonwealth during the period for which the report is filed; (5) the number of miles of all routes over which such motor vehicle or motor vehicles shall have been operated by such company during the period for which the report is filed; (6) the number of miles within this Commonwealth of all such routes so operated during the period for which the report is filed * * *"

Both the title and Section 2 clearly indicate that the tax is levied as compensation for the "use" of the highways.

Appellant's attempt to construe Section 2 as imposing a tax upon the physical extent of routes rather than upon the number of miles traveled on such routes, was rejected by the Supreme Court of Pennsylvania in its opinion as follows:

> "* * * Such a construction is unwarranted. The title of the Act provides: 'Imposing a tax on gross receipts as an excise on the use of the public highways by certain owners or operators of motor vehicles transporting passengers and property for hire.' Use of the highways can be ascertained only from the number of miles operated, not from the physical layout of the routes. We adopt as correct the construction given to the statute by the Department of Revenue in admin-

istering the tax, that is, that the tax is based upon the number of miles operated, not the physical location and the extent of the routes. Cf. Commonwealth v. Brinks, Incorporated, 346 Pa. 296, 30 A. 2d 128." (375 Pa. p. 455)

A State may impose a tax upon the gross receipts of motor carriers from interstate commerce as compensation for the use of its highways.

This principle is established in:

Dixie Ohio Express Co. v. *State Revenue Commission,* 306 U. S. 72 (1939);
Capital Greyhound Lines v. *Brice,* 339 U. S. 542 (1949);
Hendrick v. *Maryland,* 235 U. S. 610 (1915);
Aero Mayflower Transit Co., v. *Georgia Public Service Commission,* 295 U. S. 285 (1935);
Interstate Buses Corporation v. *Blodgett,* 276 U. S. 245 (1927);
Continental Baking Co. v. *Woodring,* 286 U. S. 352 (1932);
Bode v. *Barrett,* 344 U. S. 583 (February 9, 1953).

As was said in *Aero Transit Co.* v. *Commissioners,* 332 U. S. 495 (1947):

"• • • Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways." (pp. 503, 504).

The burden of proving that the taxes are in excess of a fair compensation for the privilege of using the highways is on the plaintiff carrier.

Capitol Greyhound Lines v. *Brice,* 339 U. S. 542 (1950);
Clark v. *Paul Gray, Inc.,* 306 U. S. 583 (1939);
Hendrick v. *Maryland,* 235 U. S. 610 (1915);
Aero Transit Co. v. *Commissioners,* 332 U. S. 495 (1947).

In determining what is a reasonable compensation for the use of its highways, the state may take into consideration the cost of construction as well as maintenance.

Clark v. *Poor*, 274 U. S. 554 (1927);
Interstate Busses Corp. v. *Blodgett*, 276 U. S. 245 (1928).

It would be wholly unreasonable to hold that the compensation to be paid by a motor carrier for use of the highways of the State must be based only on the cost of maintenance and not on the cost of construction. The carrier receives the benefit of both. To be included also is the cost of police protection and other expenses for insuring safety:

Morf v. *Bingaman*, 298 U. S. 407 (1936) at page 410.

The rate of tax in the Acts of 1931 and 1951 is not "excessive" or "unduly burdensome," as plaintiff alleges, upon interstate commerce.

The Pennsylvania rate is eight (8) mills. In *Aero Transit Co.* v. *Commissioners*, 332 U. S. 495, 503-504 (1947) a state tax of one-half per cent quarterly on gross revenues of motor truck carriers was sustained.

The court said:

> "* * * And, as we have said, the aggregate amount of both taxes combined is less than that of taxes heretofore sustained. * * *" (507)

The rate in this case was two and one-half times the Pennsylvania rate. Further, it is a well-known fact that the cost of constructing and maintaining roads in Pennsylvania is unusually high because of the necessity of many bridges, large cuts and fills, and great property damages in centers of population.

It is not necessary that the tax be specifically appropriated for the construction or maintenance of highways or be allotted to a special fund established for that purpose.

The State must pay the cost for constructing and maintaining the highways, and owners of trucks must pay a reasonable compensation for the use of such highways, irrespective of the fund from which the State obtained the particular moneys used in defraying the cost of constructing or maintaining the highways.

In *Morf* v. *Bingaman*, 298 U. S. 407 (1936), Mr. Justice Stone said:

> "Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, the cost of which the state pays in part from the proceeds of a general property tax. The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. Interstate Transit, Inc. v. Lindsey, supra. But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other." (p. 412)

In *Aero Transit Co.* v. *Commissioners*, 332 U. S. 495 (1947), Mr. Justice Rutledge said:

> "This does not mean, as appellant seems to assume, that the proceeds of all taxes levied for the privilege of using the highways must be allocated directly and exclusively to maintaining them. Clark v. Poor, supra, at 557; Morf v. Bingaman, supra, at 412. • • • Those cases did not hold that all state exactions for the privilege of using the state's highways are valid only

> if their proceeds are required to go directly and exclusively for highway maintenance, policing and administration. Both before and after the Interstate Transit decision this Court has sustained state taxes expressly laid on the privilege of using the highways, as applied to interstate motor carriers, declaring in each instance that it is immaterial whether the proceeds are allocated to highway uses or others. Clark v. Poor, supra, at 557; Morf v. Bingaman, supra, at 412." (p. 504)

In *Clark* v. *Poor*, 274 U. S. 554 (1927), Mr. Justice Brandeis said:

> "* * * It is said that all of the tax is not used for maintenance and repairs of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." (p. 557)

In Dixie Ohio Co. v. *Commission*, 306 U. S. 72 (1939), Mr. Justice Butler said:

> "* * * The exaction is not to be deemed offensive to the commerce clause merely because the State, in the conduct of its fiscal affairs, chooses to use part or all of the proceeds for purposes other than the construction, improvement, or maintenance of its highways. * * *" (p. 77)

Motor truck carriers must pay this tax as compensation for use of highways, irrespective of how much money the Commonwealth has in its Treasury, or to what particular fund or funds the money is credited.

Otherwise, if a state has paid in full the cost of construction and has ample funds for the maintenance of all its

highways, a foreign motor carrier could use the roads of the state and wear them out without having to pay anything.

In a footnote at the close of the dissenting opinion, the statement is made:

> "The Commonwealth must have believed that the Amendment of 1951 was unconstitutional because on August 21, 1953, the Act was amended and changed to provide that the tax receipts from intrastate commerce were to be paid into the State Treasury and credited to the General Fund, while all taxes paid by and tax receipts from interstate commerce were to be thereafter credited to the Motor License Fund." (375 Pa. at p. 472)

The Act of August 21, 1953, known as Act No. 359 (Purdon's Pennsylvania Legislative Service of 1953, p. 1098) eliminated the changes made in Section 3 by the amending Act of December 27, 1951.

The trucking interests were able to enlist enough votes in the Pennsylvania Legislature of 1953 to secure the adoption of this new law. They took this action in order to restore the credits or deductions of excise taxes paid to a city for use of the highways and registered fees paid to the Commonwealth. Whether the proceeds of this tax were allocated to the General Fund or the Motor License Fund did not affect them.

The Commonwealth did not believe that the amending Act of 1951 was unconstitutional. Five judges sitting in the Court of Common Pleas of Dauphin County had unanimously held that the amending Act of 1951 was constitutional by an opinion filed on August 25, 1952, more than a year before the passage of this last Act of August 21, 1953.

We submit that the amount of money in the Motor License Fund is wholly irrelevant. Pennsylvania can prudently expend every dollar in that fund in constructing new roads and reconstructing old roads, especially widening,

providing hard surface and improving grades and eliminating curves for existing roads.

Appellant's Bill of Complaint avers (paragraph 12) that the Motor License Fund, on June 1, 1951, amounted to $48,051,540. However, on December 37, 1951, this fund had a balance in bank of less than $10,000,000 and carried over unpaid construction obligations amounting to $101,414,000. During the period from January 1 to June 1, the fund collects the fees for owners' licenses and operators' licenses and other taxes, and always has a large cash balance on June 1, before large expenditures for maintenance and construction begin. For the fiscal year June 1, 1952, to June 1, 1953, the estimate of the cost of maintenance of the Commonwealth's 41,000-mile highway system was $32,000,000.

The Department of Highways estimated that for the calendar year 1952, it would spend over $181,000,000 and at the end of that year it would carry over $121,000,000 of unpaid construction obligations, and have a bank balance of approximately $10,000,000.

The amendment of December 27th, 1951, Pennsylvania Law 1761, in abolishing certain credits or deductions retroactively, is not unconstitutional.

Section 3 of the original Act of June 22, 1931, P. L. 694, 72 Purd. Penna. Stat. 2183, imposed an excise tax of eight (8) mills upon the gross receipts from carrying passengers or property for hire upon the highways of Pennsylvania; but allowed such carriers to deduct from such tax the amount of excise tax paid to a city and the amount of any registration fee paid to the Department of Highways of Pennsylvania.

The amending Act of December 27, 1951, P. L. 1761, eliminated these deductions beginning with the calendar year 1951, but made no other change in the amount of the tax. This amendment was made *during* the calendar year

of 1951, and before February 1, 1952, when the carrier was required to file its report of gross receipts for 1951, upon which the tax would be assessed.

This case is ruled by *Welch* v. *Henry*, 305 U. S. 134 (1938).

A statute in force in 1933 permitted taxpayers to deduct from gross income the dividends of corporations which, themselves, had paid a State income tax.

In 1935, the Legislature enacted a law which imposed a tax on all dividends received in 1933, including those which, in 1933, were deductible.

The Supreme Court of the United States held that this Act of 1935 was constitutional.

In its opinion Mr. Justice Stone said:

> "* * * Similarly, a tax on the receipt of income is not comparable to a gift tax. We can not assume that stockholders would refuse to receive corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one. The objection to the present tax is of a different character and is addressed only to the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate." (148)

So, in our case, we cannot assume that appellant would have liquidated and discontinued its business in Pennsylvania if it had foreseen the amendment of 1951.

Mr. Justice Stone further said:

> "* * * In its performance experience has shown the importance of reasonable opportunity for the legislative body, in the revision of tax laws, to distribute increased costs of government among its taxpayers in the light of present need for revenue and with knowledge of the sources and amounts of the various classes of taxable income during the taxable period preceding revision. * * *" (149-150)

The Supreme Court of the United States repeatedly and over a long period of years has upheld statutes which imposed income or other taxes retroactively.

Thus in *Stockade* v. *Atlantic Ins. Co.*, 20 Wall. 323, 331, 22 L. Ed. 348, 351 (1874), an Act of 1870 purporting to construe the Income Tax Law of 1864 was applied to income received before the passage of the later act.

See also authorities as cited in dissenting opinion of Mr. Justice Brandeis in *Untermier* v. *Anderson*, 276 U. S. 440, 447 (1928).

Other decisions upholding retroactive tax laws are:

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 55 L. Ed. 389, 31 S. C. 342 (1910);

Billings v. *United States*, 232 U. S. 261, 282, 58 L. Ed. 596, 606 (1914);

Brushaber v. *Union P. R. Co.*, 240 U. S. 1, 20, 60 L. Ed. 493, 502 (1916)

Hecht v. *Malley*, 265 U. S. 144, 163-164, 68 L. Ed. 949, 44 S. Ct. 462, 469 (1924);

Milliken v. *United States*, 283 U. S. 15, 21, 75 L. Ed. 809, 814 (1931 upholding tax on gift in contemplation of death made before passage of statute).

Appellant's brief attempts to explain the overwhelming body of authority, which holds that a tax may be imposed retroactively, by arguing (p. 73) that the tax in the case at bar is like the Federal Gift Tax.

The reason for the rule in the Gift Tax decisions was explained by Mr. Justice Stone in *Welch* v. *Henry*, 305 U. S. 134 (1938) as follows:

> "In the cases in which this Court has held invalid the taxation of gifts made and completely vested before the enactment of the taxing statute, decision was rested on the ground that the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which

> the statute later made the taxable event. * * * But there are other forms of taxation whose retroactive imposition cannot be said to be similarly offensive, because their incidence is not on the voluntary act of the taxpayer. * * * (147)
>
> "* * * Similarly, a tax on the receipt of income is not comparable to a gift tax. * * *" (148)

A donor might have foregone the gift if he had anticipated the enactment of a gift tax. But it cannot be assumed that a corporation engaged in the business of a motor carrier would have discontinued business if it had foreseen the enactment of a tax on gross receipts of carriers.

So, in every one of the customary taxes imposed by Congress upon net income, the taxpayer could argue with equal reason that if he had known that the tax would be imposed retroactively, he would have increased his income by raising rates or prices, or decreased his income by making deductible expenditures, so as to counteract the effect of the retroactive tax in reducing the amount of money that he had left after paying his income tax.

The tax in the case at bar was not on a voluntary act of the Plaintiff which he could have omitted or foregone, but was imposed on the receipts obtained by the carrier in the regular course of business in which it had been engaged for years.

It is true in the case of every retroactive tax that the businessman has prepared his estimate or budget of receipts including taxes, and has regulated his prices and expenses accordingly. This does not make the State's economy or system of taxation static or immutable, and does not prevent the enactment of a retroactive tax to meet the needs, often unforeseeable, of the State.

The fact that the taxpayer might have taken steps to avoid the tax if he had anticipated the same, was disregarded in:

Billings v. *United States*, 232 U. S. 261 (1914);
Wichard v. *Filburn*, 317 U. S. 111 (1942);

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113 (1920);

Cheney Brothers Co. v. *Massachusetts*, 246 U. S. 147, 156-157 (1918);

Wagner v. *Baltimore*, 239 U. S. 207 (1915).

The tax is not discriminatory and does not violate Amendment XIV.

The right of the Commonwealth of Pennsylvania to tax gross receipts from transportation over the Pennsylvania Turnpike, was not raised or decided in this case.

In Paragraph 4, the statement of jurisdiction quotes paragraph 20(e), in which appellant contends that discrimination exists in that "the tax is not imposed upon transportation over the highway while carrying the mails".

We submit, however, that the difference between the United States performing a governmental function in arranging the transportation of the mails by common carrier, and private shippers is fundamental and obvious.

In the same subparagraph (e), appellant argues that discrimination exists because the tax applies solely to those carrying property for hire and not to those carrying property in their own business. A similar classification was sustained in *Stephenson* v. *Binford*, 287 U. S. 251, 278 (1932). See also *Sproles* v. *Binford*, 286 U. S. 374, 393-394 (1932).

Respectfully submitted,

HARRY F. STAMBAUGH,
Special Counsel;

FRANK F. TRUSCOTT,
Attorney General,
Counsel for Appellees.

IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT

No. 22, MAY TERM, 1953

SHIRKS MOTOR EXPRESS CORPORATION,
Appellant,

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellees

APPEAL FROM THE JUDGMENT OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY AT NO. 2015 EQUITY DOCKET, COMMONWEALTH DOCKET NO. 34, 1952

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, the Commonwealth of Pennsylvania and moves that the appeal in the above case be dismissed on the ground that the case presents no substantial federal question, and it further moves that, if the motion to dismiss be not granted, this court affirm the decision of the Supreme Court of Pennsylvania on the ground that the questions on which the decision of this cause depends, are so unsubstantial as not to need further argument. In sup-

port of this motion the appellee advances the reasons set forth in the statement opposing jurisdiction filed in connection with this appeal.

HARRY F. STAMBAUGH,
Special Counsel;

FRANK F. TRUSCOTT,
Attorney General,
Counsel for Appellees.

(4034)

15

MAR 6 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 615

SHIRKS MOTOR EXPRESS CORPORATION,
Appellant

vs.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania, and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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Constitutional Provisions:

Constitution of United States:

Article I, Section 8 — 1

Article XIV, Section 1 — 1

I.

INTRODUCTION

This is an appeal from the Judgment of the Supreme Court of Pennsylvania. The Opinion of the Court and the Dissenting Opinion of Justice Bell are reported in the official State Advance Reports at 375 Pa. 450 and 463, respectively. The decision was rendered on November 17, 1953; and reargument was refused on December 30, 1953. An appeal to the Supreme Court of the United States from this decision was allowed by the Chief Justice of the Supreme Court of Pennsylvania by Order dated January 30, 1954.

The jurisdiction of this Honorable Court is invoked on the ground that in this action Appellant sought a decree invalidating the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, P. L. 1761, of the Commonwealth of Pennsylvania, because it is repugnant to the Commerce Clause of Article I, Section 8, and the Due Process Clause of Article XIV, Section 1, of the United States Constitution, and the Supreme Court of Pennsylvania considered and decided these constitutional questions and held that the Act was not repugnant to the Constitution of the United States and sustained its validity.

Introduction

The Appellees have filed a Statement Opposing Jurisdiction and a Motion to dismiss this appeal, on the ground that the case presents no substantial Federal question, or to affirm the decision, on the ground that the Federal questions are insubstantial. Hence this brief.

II.
STATEMENT OF THE CASE

Appellant, Shirks Motor Express Corporation, is a Delaware corporation registered to do business in the Commonwealth of Pennsylvania. It is engaged in the business of transporting property by motor vehicle as a common carrier. It so engages in interstate transportation, pursuant to certificates issued by the Interstate Commerce Commission, over various routes and between various points in seven states, including Pennsylvania, and the District of Columbia. It is so engaged in intrastate transportation, pursuant to a certificate issued by the Pennsylvania Public Utility Commission, over certain routes in Lancaster, Chester, and Delaware Counties, Pennsylvania. The latter represents a very small portion of its business. For example, in 1951 its trucks travelled 7,964 miles in such intrastate operations and the receipts amounted to $25,473.89, as compared to 12,198,271 miles and receipts of $6,987,592.58 from interstate operations in Pennsylvania (Bill of Complaint, Paragraphs 1, 4, 5, 17 and 18).

Appellant pays to the Commonwealth of Pennsylvania taxes for liquid fuels, registration fees on its vehicles, and taxes on its gross receipts, as well as the Corporate Net Income Tax, and franchise and bonus taxes on foreign corporations (Bill of Complaint, Paragraph 6).

It made a net profit of $12,240.52 from its trucking business for the year 1951, after providing for all taxes, except the taxes imposed by the Pennsylvania statute here in question. If the latter tax were imposed upon it such would amount to $36,986.47, of which sum $36,782.68 thereof would represent the tax on its interstate operations, thus causing it to suffer a net loss of $24,745.95 from its trucking business during 1951 (Bill of Complaint, Paragraphs 19 and 20).

Appellant brought a bill in equity against the Secretary of the Department of Revenue and the Auditor General of the Commonwealth of Pennsylvania, to enjoin them from enforcing the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, P. L. 1761, which imposes a tax on the gross receipts of common carriers by motor vehicle, on the ground, inter alia, that it violates certain provisions of the United States Constitution. The defendants filed preliminary objections in the nature of a demurrer, to the effect that such Act, as amended, is not violative of such constitutional provisions. Accordingly all facts averred by Appellant in its Bill of Complaint are admitted.

The Appellant takes the position that this statute contravenes the United States Constitution in two respects, namely, that it violates the Commerce Clause of Article I, Section 8, and the Due Process Clause of Article XIV, Section 1.

ARGUMENT

In both this case and in the case of *Interstate Motor Freight System, Inc. vs. Otto F. Messner et al.*, on appeal before this Honorable Court, at No. 606, October Term, 1953, bills in equity were brought against the same State officials to enjoin enforcement of the same Pennsylvania statute, on the ground that it contravenes the United States Constitution. The two cases were consolidated for the purpose of argument before the Supreme Court of Pennsylvania and only one opinion and order was entered by that Court covering both appeals.

This Appellant raised the same legal issues as did Interstate Motor Freight System, Inc., with one exception, namely: the imposition of the instant gross receipts tax upon the receipts arising from interstate transportation over the Pennsylvania Turnpike was not involved in this case. Accordingly the constitutional issues created by that particular imposition are not present here.

Appellant's Brief Opposing Appellees' Motion to Dismiss or Affirm, filed in this Court in the Interstate Case, advances all the constitutional issues that, and supports them by such argument as, this Appellant could make. Accordingly, to avoid repetition[1],

[1] As did the Appellees in their statements opposing jurisdiction filed in each of these appeals, the one filed in the Interstate case discussing only the Turnpike ques-

Appellant relies upon and refers to that Brief for its argument; and herein will merely point out what portions of that Brief are here pertinent.

Appellant takes the position that the statute violates the Commerce Clause, as is fully developed in Part A of the Argument in the Interstate brief. However, in that argument one of the several factors relied upon to establish that the tax is an unconstitutional one is that it is imposed on Turnpike receipts (Part A, 5 of the Argument). This feature of the statute is not urged here.

Appellant does not contend that the statute violates the Equal Protection Clause, as does Interstate.

Appellant takes the position that the statute violates the Due Process Clause, as is expounded in Part C of the Argument in the Interstate brief. With respect to the argument on this point the actual effect of the retroactive imposition of the tax created by the amendment of December 27, 1951, upon this Appellant graphically demonstrates its confiscatory nature.

A tax imposed upon gross receipts is a part of the expenses of a business, like labor and material; and the entrepreneur must include this among his costs to determine his compensatory charges or rates. Such tax is a part of the facts upon which he relies and changes his position. If such a tax is enacted or

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tion, and that filed in this case discussing the remaining questions.

increased and given retroactive effect for any substantial period of time it can be financially disastrous, for it adds greatly to his costs of operation without giving him an opportunity to avoid it, or recoup it. In the case of this Appellant it converts a modest profit into a substantial loss.

Shirks Motor Express Corporation made a net profit of $12,240.52 from its trucking business for the year 1951, after all State taxes except that imposed by the amendatory act of December 27, 1951. Due to the credits for license fees it was not subject to any gross receipts tax under the original Act of 1931. If the gross receipts tax is imposed upon it according to the Act of 1951 the tax will amount to $36,986.47, thus causing it to suffer a loss of $24,745.95 from its operations during the year. (Bill of Complaint, Paragraphs 19 and 20, and Exhibit "B").

Thus does the Legislature, with but four days remaining in the year, add almost $37,000 to Appellant's costs of operation throughout that year—a cost which it could not possibly have anticipated and cannot now recoup. This tax on gross receipts, if valid at all, can only be so on the basis that it is a charge, like license fees or tolls, for use of the highways in conducting business. Can the Legislature fix that charge at the beginning of the year—upon which the carrier will rely in fixing its charges—and then change it retroactively at the end of the year, so as to take away the carrier's profit and impose a loss? Surely this is a prime example of taking one's property without due process of law.

Wherefore, it is earnestly submitted that Appellees' Motion to dismiss the appeal should be denied; and that the judgment of the Supreme Court of Pennsylvania should be reversed and the Act of June 22, 1931, P. L. 694, as amended by the Act of December 27, 1951, P. L. 1761, be declared unconstitutional and void.

Respectfully submitted,
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Counsel for Appellant.

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MAR 20 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 615

SHIRKS MOTOR EXPRESS CORPORATION,
Appellant,

v.

OTTO F. MESSNER, Secretary of the Department of Revenue of the Commonwealth of Pennsylvania and WELDON B. HEYBURN, Auditor General of the Commonwealth of Pennsylvania.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

APPELLEES' REPLY TO APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

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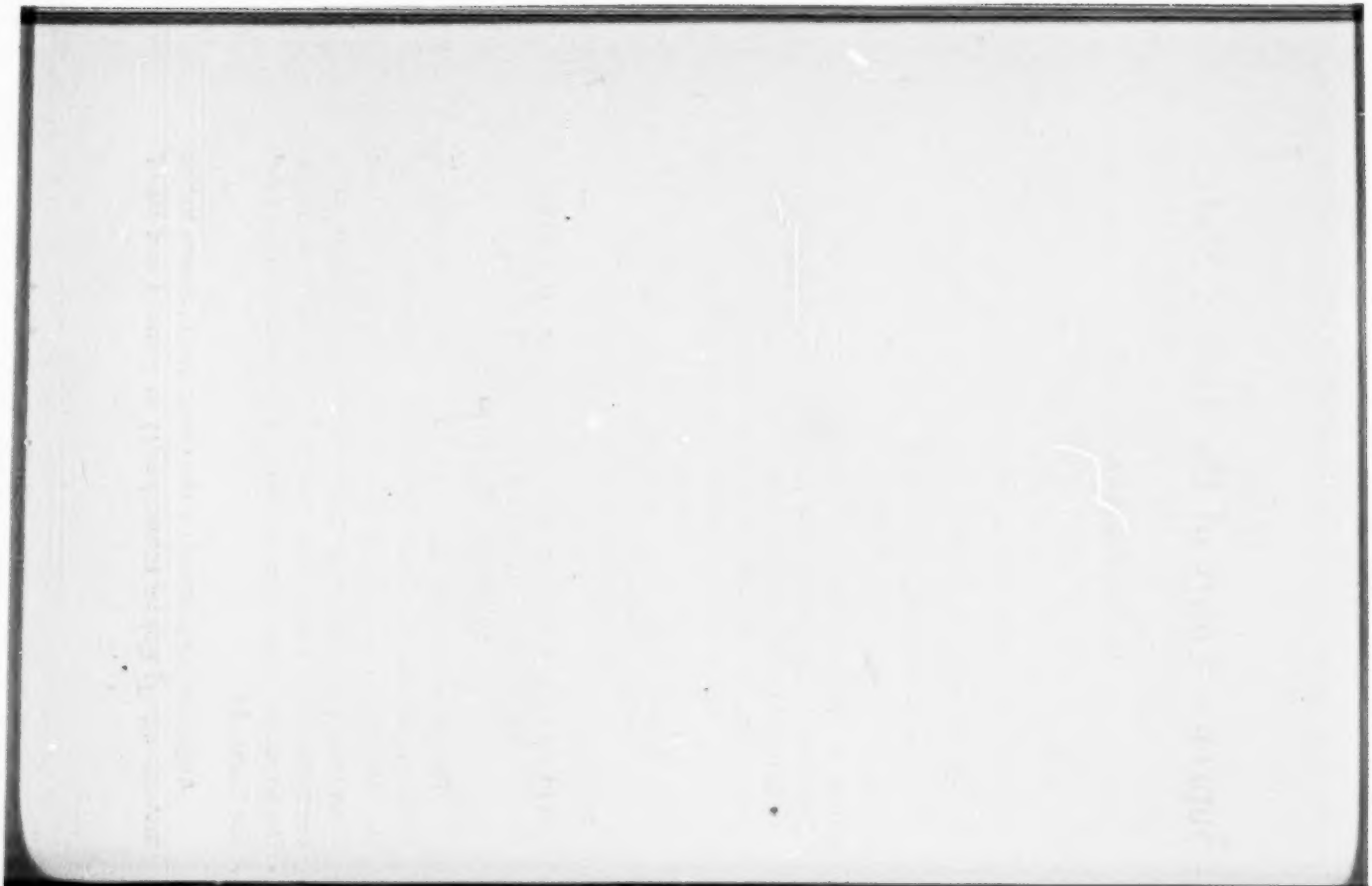

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Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

APPELLEES' REPLY TO APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS OR AFFIRM

The questions involved in this appeal are the same as those in the appeal of Interstate Motor Freight System, No. 606, except that the power to tax the gross receipts from transportation over the Pennsylvania Turnpike was not involved in the instant case. Shirk's Motor Express Corporation made no claim that it was transporting over the Turnpike.

Appellees' argument on the questions involved in the instant appeal will be found partly in points I and III of

the Reply Brief filed by appellees in the Interstate appeal, and partly in the statement opposing jurisdiction previously filed in this Shirk's Motor Express Corporation appeal.

Respectfully submitted,

HARRY F. STAMBAUGH,
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FRANK F. TRUSCOTT,
Attorney General,
Attorneys for Appellees.

APR 27 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 615

SHIRKS MOTOR EXPRESS CORPORATION,
Appellant,

vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR REHEARING OF PER CURIAM ORDER DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 615

SHIRKS MOTOR EXPRESS CORPORATION,
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vs.

OTTO F. MESSNER, SECRETARY OF THE DEPARTMENT OF REVENUE OF THE COMMONWEALTH OF PENNSYLVANIA, AND WELDON B. HEYBURN, AUDITOR GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR REHEARING OF PER CURIAM ORDER DISMISSING THE APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Appellant, Shirks Motor Express Corporation, respectfully prays this Honorable Court to grant rehearing of its

Order of April 12, 1954 which, per curiam, granted the motion of Appellees to dismiss, and dismissed this appeal for the want of a substantial federal question.

Appellant further prays that this Honorable Court note probable jurisdiction in this case, set it down for argument, afford Appellant the opportunity to brief and argue the merits of the substantial federal questions of law presented, and render a decision upon the issues.

STATEMENT

Appellant, a corporation organized under the laws of the State of Delaware, brought a bill in equity to enjoin the enforcement by the Commonwealth of Pennsylvania of the Act of June 22, 1931, P.L. 694, as amended by the Act of December 27, 1951, P.L. 1761, 72 Purdon's Pa. Statutes Annotated, Sections 2183 to 2194, inclusive, which imposes a tax on the total gross receipts of interstate common carriers by motor vehicle. The amendatory provisions of this law, enacted December 27, 1951, are made retroactively effective from January 1, 1951.

Appellees filed preliminary objections to the bill which are in the nature of a demurrer. Accordingly, all of the facts averred in the bill in equity which are deemed material to the issues in this case are, for the purpose of this appeal, considered to be true and correct.

Carlin v. Pennsylvania Power & Light Co., 363 Pa. 543, 70 A. 2d 349 (1950)
Narehood v. Pearson, 374 Pa. 299, 96 A. 2d 895 (1953)

The tax formula provides for a payment of 8 mills upon the dollar on that portion of the total gross receipts of the interstate carrier which is represented by the ratio that the

number of miles traveled in Pennsylvania bears to the total number of miles traveled in its entire operations, irrespective of the portion, large or small, of the entire operations which is comprised of movements exclusively over highways not in Pennsylvania.

The original Act of 1931 provided that all taxes on gross receipts and all registration fees of interstate carriers were to be paid into the State Treasury through the Department of Revenue and credited to the Motor License Fund. In computing the gross receipts tax, a credit was allowed for registration fees paid on vehicles licensed in Pennsylvania and for excise taxes which the carrier paid to cities within the State. The Act of 1951 provides that the gross receipts tax shall be paid into the State Treasury through the Department of Revenue and credited to the General Fund, and eliminated and cancelled the credits previously allowed.

No part of the moneys comprising the General Fund can be used for highway purposes. The State Highway Law, enacted June 1, 1945, P.L. 1242, Section 1002, 36 P.S. Section 670 — 1002, provides that "all expenditures" authorized to be made thereunder shall be paid out of the Motor License Fund, as appropriated.

The Supreme Court of Pennsylvania (Justice Bell dissenting) determined that the Act of 1931, as amended by the Act of 1951, did not violate any provision of the Constitution of the United States, specifically, the Commerce Clause of Article I, Section 8, and the Due Process Clause of Section 1 of the Fourteenth Amendment, and it dismissed the complaint. Pursuant to 28 U.S.C. 1257 (2) this appeal was duly filed with this Honorable Court on January 22, 1954. Appellees filed a Motion to Dismiss. In the absence of written or oral argument on the merits of the contro-

versy, this Honorable Court entered its Order, April 12, 1954, as follows:

> PER CURIAM: The motions to dismiss are granted and the appeals are dismissed for the want of a substantial federal question.
>
> Mr. Justice Jackson took no part in the consideration or decision of these cases.

THE ISSUES IN THIS CASE

Appellant complains that the Act of 1931, as amended by the Act of 1951, is repugnant to the Constitution of the United States, and abridges its rights thereunder, upon the following grounds, each of which involves substantial federal questions:

1. This statute, in actual fact, imposes a tax on the privilege of engaging in interstate commerce.
2. The tax formula has no reasonable relationship to the use of the State's highways, and therefore the tax exacted is not a compensatory payment for such use.
3. This statute subjects interstate commerce to improper multiple taxation.
4. This statute retroactively eliminated the fully vested credits acquired for valuable consideration, thereby taking property without due process of law, and imposing an unreasonable burden on interstate commerce.

1. This Statute, in Actual Fact, Imposes a Tax on the Privilege of Engaging in Interstate Commerce.

Appellant contends that the Act of 1951 imposes a tax on the privilege of engaging in interstate commerce, and that therefore the statute is unconstitutional.

Sprout v. South Bend, 277 U.S. 163 (1927)
Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931)
Dixie Ohio Express Co. v. State Revenue Commission, 306 U.S. 72 (1939)

It is a fundamental principle that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on.

Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925)
Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1946)
Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951)
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954)
Railway Express Agency, Inc. v. Virginia, 22 Law Week 4186, No. 163, Current Term (April 6, 1954)

It is, however, well settled that a state may impose a fair, reasonable and non-discriminatory tax upon carriers who use its highways, for the cost, maintenance, and other proper highway expenses, as compensation for the use of its highways, even though such carrier is engaged partly or exclusively in interstate commerce. It must be affirmatively shown that it is levied for the purpose of obtaining such compensation.

Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1927)
Aero Mayflower Transit Co. v. Commissioners, 332 U.S. 495 (1947)
Capital Greyhound Lines v. Brice, 339 U.S. 542 (1950)

Hence, to adjudge this issue, it is necessary to determine the category into which this statute falls, i.e., does it impose a tax (a) on the privilege of performing interstate commerce for general revenue purposes, or (b) on the use of the State's highways, for compensation covering the highway uses. This determination requires that an analysis be made of the statute itself in the light of the material facts respecting it which are set forth in the bill in equity. "To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulation of the commerce which are within its constitutional power."

Ingels v. Morf, 300 U.S. 290, 294 (1937)

The title and Section 2 of the Act of 1931, as amended by the Act of 1951, declare that the instant tax is an "excise tax" on gross receipts levied (as compensation) for the "use" of the highways. It is a federal question whether, in actual fact, the tax is as designated, albeit this declaration is entitled to weight. Stated another way, the meaning and effect of the statute must be consistent with its designation.

Sprout v. South Bend, 277 U.S. 163 (1927)
Interstate Transit, Inc. v. Lindsey, 283 U.S. 183 (1931)
Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951)

The demurrer admits that none of the tax, (or tax receipts) are used directly, indirectly, or in practical operation or effect, for the cost, maintenance or use of the State's highways. An exactly similar factual situation to the instant case was presented to this Honorable Court in *Ingels*

v. Morf, 300 U.S. 290 (1937), and the statute therein was declared unconstitutional.

Another case close on its facts to the instant case, and controlling it, is *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931), wherein this Honorable Court held the statute unconstitutional.

In each of the *Ingels* and *Interstate* Transit cases this Honorable Court noted jurisdiction, heard argument and rendered a decision of unconstitutionality.

The original Act of 1931 provided that the taxes collected from intrastate carriers are credited to the General Fund and that taxes collected from interstate carriers are credited to the Motor License Fund. It purported to be, and in fact was, a tax imposed as compensation for use of the highways.

The Act of 1951, augmented by the above mentioned State Highway Law, and the greatly altered condition of the General Fund and the Motor License Fund, radically changed the situation. All taxes collected under the amendatory act (Act of 1951) are now paid into or credited to the General Fund.

The Demurrer of Appellees admits (1) that the Motor License Fund has an enormous balance which is more than amply sufficient to pay for the cost and expense of constructing and maintaining roads, as well as all of the expenses of the Highway Department; and (2) that the Legislature has not appropriated and does not appropriate any moneys out of the General Fund for highway purposes; and (3) that the funds used for highway purposes are derived solely from registration fees, gasoline and other motor fuel excise taxes and similar fees and taxes, all of which

go into the Motor License Fund and/or may be used solely for public highways and costs and expenses incident thereto.

No part of the taxes collected from interstate carriers under the Act of 1951 are used for highway purposes.

Appellant respectfully submits that the instant statute involves substantial federal questions. It is violative of the Commerce Clause of the Constitution of the United States and is contrary to the decisions of this Honorable Court, for the reason that the tax imposed by the Act of 1951 is, in actual fact, a tax on the privilege of engaging in interstate commerce, despite its declaratory statement that it is a compensatory tax for the use of the highways.

2. The Tax Formula has no Reasonable Relationship to the Use of the State's Highways, and Therefore the Tax Exacted is not a Compensatory Payment for Such Use.

The statute imposes a gross receipts tax on that portion of the total revenue of the interstate carrier which is represented by the ratio that the number of miles traveled in Pennsylvania bears to the total number of miles traveled throughout its entire operations. The Supreme Court of Pennsylvania, in deciding the instant case, restated this formula and determined it to be as follows: "The numerator of the tax formula is the number of miles operated in Pennsylvania. The denominator is the total number of miles operated. The multiple is the gross receipts of the carrier from all of its operations. The tax of eight mills is imposed upon the result of this calculation."

Shirks Motor Express Corporation v. Messner, 375 Pa. 450, 100 A. 2d 913 (1953)

Appellant engages in interstate transportation, pursuant to certificates of public convenience issued by the Inter-

state Commerce Commission, over various routes and between various points, in the seven states of Pennsylvania, New York, New Jersey, Delaware, Maryland, Virginia and Ohio, and the District of Columbia. The denominator of the formula includes mileage of the highways traversed by the carrier in transporting movements between points wholly unrelated to Pennsylvania. The multiple includes gross revenue from all interstate operations. Both the denominator and the multiple therefore include operations which are not conducted through, into or out of Pennsylvania. They include, for example, the mileage traveled and the freight receipts on transportation performed between Maryland and Virginia, or between New York and New Jersey, which in nowise utilizes the highways of Pennsylvania.

For this statute to be lawful under the Commerce Clause it must bear reasonable relationship to the privilege granted of use of the highways. It must be measured, on some concept of approximation or rough estimate, by a formula which relates it to such use. Unless it is so fairly apportioned, it is violative of the Commerce Clause and contrary to the decisions of this Honorable Court.

Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1927)
Dixie-Ohio Express Co. v. State Revenue Commission, 306 U.S. 72 (1939)
McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940)
Capitol Greyhound Lines v. Brice, 339 U.S. 542 (1950)

The decision of the State Court in the instant case is in direct conflict with the recent decision in *Railway Express Agency, Inc. v. Virginia*, 22 Law Week 4186, No. 163, Cur-

rent Term (April 6, 1954). In that case, this Honorable Court declared unconstitutional the Virginia statute which imposed a tax on the total gross receipts from interstate commerce passing through, into or out of Virginia as a measure of the intangible property value of the company in the State of Virginia, for the reason that these gross receipts had no fair relationship to the value of the intangibles in that State.

The Pennsylvania statute imposes a tax on gross receipts of the carrier which have no relationship to its use of the Pennsylvania highways. This presents a substantial federal question.

Western Livestock v. Bureau, 303 U.S. 250 (1937)
Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948)

Appellant performs an insignificant portion of its total trucking business in intrastate commerce within the State of Pennsylvania. The bill in equity states that its motor vehicles performing intrastate transportation traveled a total of 7,964 miles during the year 1951 in Pennsylvania and the total gross receipts from such operations amounted to $25,473.89. Contrasted therewith, Appellant's motor vehicles performing interstate transportation, included that which moved through, into or out of Pennsylvania, and otherwise, traveled a total of 12,198,271 miles during the year 1951 and the total gross receipts from such operations amounted to $6,987,592.58. The tax on Appellant's interstate operations for the year 1951, here in dispute, would amount to $36,782.68.

3. This Statute Subjects Interstate Commerce to Improper Multiple Taxation.

The tax formula in this statute imposes the excise upon the total gross revenue derived from interstate business, including that business which does not in any wise use the highways of Pennsylvania by passing through, into, or out of Pennsylvania.

This statute is in direct conflict with the decisions of this Honorable Court which preclude the states from imposing multiple taxation upon interstate commerce.

Joseph v. Carter & Weekes Stevedoring Company, 330 U.S. 422 (1946)
Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157 (1954)

Under such a tax statute "a concern doing a nationwide business is vulnerable to a gross revenue tax in every one of the 48 states." *Railway Express Agency, Inc. v. Virginia*, 22 Law Week 4186, No. 163, Current Term (April 6, 1954).

The tax must be "fairly apportioned" to the use of the highways of the state in order to avoid the defect of multiple taxation upon interstate commerce.

Western Livestock v. Bureau, 303 U.S. 250 (1937)
Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948)

The issue of multiple taxation on interstate commerce presented in the instant case involves a substantial federal question.

4. This Statute Retroactively Eliminated the Fully Vested Credits Acquired for Valuable Consideration, Thereby Taking Property Without Due Process of Law, and Imposing an Unreasonable Burden on Interstate Commerce.

A. The Act of 1951 imposes a tax upon the total gross receipts of interstate carriers. Prior to its enactment, carriers were entitled to a credit, against the gross receipts tax imposed by the Act of 1931, for the monies paid covering registration fees on vehicles licensed in Pennsylvania and excise taxes collected by various cities within the State.

Interstate carriers were able to substantially reduce or avoid the tax imposed by the Act of 1931 by licensing a portion of their vehicles in Pennsylvania. Registration fees, and the benefits of licensing vehicles in a particular state, vary widely among the several states.

Appellant registered a large portion of its entire vehicular fleet in Pennsylvania in order to gain from the registration fees which it paid a complete offset credit against its then existing obligation for the gross receipts tax. It expended $54,936.50 for 1951 registration fees on vehicles licensed in Pennsylvania prior to December 27, 1951 (See Bill of Complaint, Exhibit "B"), plus an unstated amount of excise taxes to cities within the State.

The 1951 gross receipts tax obligation of Appellant under each of the Act of 1931 and the Act of 1951 with respect to its interstate operations, is identical, to wit: $36,782.68 (See Bill of Complaint, Exhibit "B"). Its credit for 1951 registration fees of $54,936.50 more than offset the stated gross receipts tax owing under the Act of 1931. The elimination and cancellation of this credit by the Act of 1951, enacted

on December 27, 1951, retroactively effective from January 1, 1951, resulted in a loss of Appellant's credit of $54,936.50 in its entirety and a consequent tax obligation of $36,782.68.

This credit of $54,936.50, for registration fees paid to Pennsylvania, was a fully vested property right acquired for a valuable consideration. Appellant complains that this amendatory Act of 1951 is violative of the Due Process Clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and it is in direct conflict with the long line of decisions of this Honorable Court.

The situation is comparable to that present in the case of *Stewart v. Keyes*, 295 U.S. 403 (1935), which involved a federal statute to remove the bar of the statute of limitations. This Honorable Court held the statute unconstitutional stating, "The reason is", (quoting from *Campbell v. Holt*, 115 U.S. 620, 623 (1885)) "that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title . . . would be to deprive him of his property without due process of law". This issue involves a substantial federal question which should be determined by this Honorable Court.

B. Interstate motor common carriers must charge for their transportation services in accordance with their tariffs which are filed with the Interstate Commerce Commission. *Interstate Commerce Act, Part II*, Title 49 — Chapter 8, U. S. Code, Section 217 (49 U.S.C. Section 317). Their rates are fixed in relationship to their costs of operation; they are never readjusted, retroactively, to compensate for additional costs incurred in conducting their operations. The imposition of a substantial tax burden upon an interstate

common carrier, by retroactively eliminating the fully vested credits acquired by it for valuable consideration during the period of the prior twelve months, inflicts an irreparable loss. It jeopardizes the carrier's ability to perform interstate operations in the future, which operations it is obligated by law to perform, not only through, into and from Pennsylvania, but also between points in other states not requiring the use of Pennsylvania highways.

In the instant case, elimination of the vested credits by the Act of 1951 converts the operations of Appellant for the calendar year 1951 from a net profit of $12,240.52 to a net loss of $24,745.95 (See Bill of Complaint, Paragraphs 19 and 20).

The statute contravenes the National Transportation Policy of the Congress of the United States as declared in the preamble of the *Interstate Commerce Act, Part I* (Title 49, U.S.C.), which the Interstate Commerce Commission is charged to administer, to wit: ". . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; . . ."

Appellant complains that this amendatory Act of 1951 is violative of the Commerce Clause of Article I, Section 8, of the Constitution of the United States, for it is oppressive, unduly burdensome and unduly interferes with interstate commerce. The statute is in direct conflict with the multitude of decisions of this Honorable Court. This issue involves a substantial federal question.

CONCLUSION

In the recent decision of this Honorable Court upon the gross receipts tax imposed by a Virginia statute, in the case of *Railway Express Agency, Inc. v. Virginia*, 22 Law Week 4186, No. 163, Current Term (April 6, 1954), Mr. Justice Jackson, speaking for the Court, said:

> This appeal from the Supreme Court of Appeals of Virginia presents another variation of the seemingly endless problems raised by efforts of the several states to tax commerce as it moves among them.
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> . . . . . .
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> . . . The State's highest court approved. While great respect is due these conclusions, it has long been held that in a case involving the line between permissible state taxation of property at its full value, including going concern value, and prohibited taxation of gross receipts from interstate commerce, "neither the state courts nor the legislature, by giving the tax a particular name or by the use of words, can take away our duty to consider its nature and effect," *Galveston, H. & S.A.R. Co. v. Texas*, 210 U.S. 217, 227, in which inquiry "we are concerned only with its practical operation". *Lawrence v. State Tax Commission*, 286 U.S. 276, 280. See *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 443-444.

It is respectfully submitted that there are several substantial federal questions involved in the case at bar. It is earnestly petitioned that this Honorable Court not permit this case, which concerns vital issues of Federal Constitutional rights, to be disposed of without consideration on its merits.

For the reasons herein urged, Appellant respectfully requests this Honorable Court to grant rehearing of its Order of April 12, 1954, to note probable jurisdiction, and to set

the case down for argument on the merits of the substantial federal questions of law presented, affording Appellant an opportunity to brief and to argue orally and giving Appellant and other litigants the guidance of explanation or citation in the decisions of this Honorable Court.

Respectfully submitted,

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Shirks Motor Express
Corporation.

Baltimore, Maryland, April 26, 1954.

Certificate

I hereby certify that the foregoing Petition is presented in good faith and not for delay, and that in the opinion of counsel it is well founded.

JOHN R. NORRIS,

Attorney for Appellant,
Shirks Motor Express
Corporation.